JUN 2
JOHN E. DAVIS

IN THE

Supreme Court of the United States

October Term, 1969

No. ~~1033~~ 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS

J. MARTIN CORNELL,
Attorney for Respondents,
14 South Main Street,
New City, New York 10956.
(914) 634-4685

ARTHUR J. PRINDLE,
County Attorney of Rockland County.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provision and Statute Involved	2
Question Presented	2
Statement of the Case	3
Summary of Argument	5
ARGUMENT:	
I. Adherence to political subdivision boundaries at the local level is a rational justification for minor population deviations among legislative districts	6
II. This Court's decisions in the *Kirkpatrick* and *Wells* cases do not prohibit justifiable population deviations on the local level	17
III. The Rockland County apportionment plan of multimember districts is inherently valid under the Equal Protection Clause and is not susceptible to attack by a mathematical analysis of the representation process	23
IV. Sound policy considerations require some flexibility in the application of the equal-population principle to local governments	27
Conclusion	30
Appendix	31

TABLE OF CONTENTS

CITATIONS

PAGE

Cases:

Avery v. *Midland County*, 390 U. S. 474 ..... 2, 5, 7, 18, 28
Burns v. *Richardson*, 384 U. S. 73 .....15, 23, 26
Chavis v. *Whitcomb*, 305 F. Supp. 1364, Pending on Appeal, No. 735, 1198, this term 26
Dusch v. *Davis*, 387 U. S. 112 28
Fortson v. *Dorsey*, 379 U. S. 433 ..... 23, 26
Hadley v. *Junior College District of Metropolitan Kansas City*, —— U. S. ——, 24 L Ed 2d 45 ..... 15, 28
Kilgarlin v. *Hill*, 386 U. S. 120 .....7, 13, 23
Kirkpatrick v. *Preisler*, 394 U. S. 526 ..... 5, 6, 17, 18, 19, 21, 22
Lodico v. *Board of Supervisors of Rockland County*, 256 F. Supp. 442 13
Sailors v. *Kent Board of Education*, 387 U. S. 105 28
Swann v. *Adams*, 385 U. S. 440 .....7, 12, 23
Reynolds v. *Sims*, 377 U. S. 533 ..... 2, 5, 6, 7, 15, 17, 18, 21, 26
Wells v. *Rockefeller*, 394 U. S. 542 ..... 5, 6, 17, 18, 19, 21, 22

Constitution and statutes:

U. S. Constitution:
Fourteenth Amendment 2
County Law of New York (11 McKinney's Consol. Laws) 8, 9
Municipal Home Rule Law of New York (35C McKinney's Consol. Laws) Section 10 (Chapter 834 of the Laws of 1969) 2, 12, 31
Town Law of New York (61 McKinney's Consol. Laws) 9

TABLE OF CONTENTS

PAGE

Miscellaneous:

Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle,* 75 Yale L. J. 1309 (1966) 23, 25

Banzhaf, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation,* 36 Geo. Wash. Law Rev., 808 (1968) 25

Bureau of Census, Special Census of Rockland County, May 2, 1969 10

Dixon, *Democratic Representation: Reapportionment in Law and Politics,* 458, 537 (1968), The Oxford Univ. Press 16, 23

Office of Local Government, Albany, New York, Information Bulletins, *Reapportionment, Local Government Legislative Bodies,* No. 17 and No. 18 22

Pennock & Chapman, Editors, *Representation: Nomos X,* 183 (1968), Atherton Press 23

Symposium—One Man-One Vote And Local Government, 36 Geo. Wash. Law Rev. 741 et seq. (1968) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1033

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Supreme Court of the State of New York, dated July 21, 1969 and modified on July 30, 1969, is not reported (A. 10 and A. 19).

The opinion of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, dated August 26, 1969, and the dissenting opinion are reported at 33 A. D. 2d 660 (A. 24 and A. 25).

The opinion of the Court of Appeals of New York, dated October 8, 1969, and the dissenting opinion are reported at 25 N. Y. 2d 309 (A. 34 and A. 42).

Jurisdiction

The order of the Court of Appeals of New York was made and entered on October 8, 1969 (A. 31). The petition for a writ of certiorari was filed on January 5, 1970 and granted on February 24, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

Constitutional Provision and Statute Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Chapter 834 of the Laws of 1969 of the State of New York amended Section 10 of the Municipal Home Rule Law and is set out in part in Appendix A-1 of this brief.

Question Presented

The question presented is whether the plan of reapportionment, which provides for the election of legislators to the legislative body for Rockland County, New York, complies with the equal-population principle enunciated in *Reynolds* v. *Sims,* 377 U. S. 533, and extended to local governments by *Avery* v. *Midland County,* 390 U. S. 474.

Statement of the Case

The County of Rockland is a suburban county in the State of New York located approximately 30 miles north of New York City on the west side of the Hudson River opposite Westchester County. The county includes five towns and thirteen villages. There are no cities in Rockland County. Until the recent apportionment the County was governed by a Board of Supervisors which had both legislative and executive functions. The Board was composed of five supervisors, one being elected from each of the five towns within the County. The supervisor elected in each town served as a member of the County Board of Supervisors by virtue of his election as the executive head of the governing body in the town. The population of each town within the County, as determined by a Federal Census in 1969, was as follows:

Stony Point	12,114
Haverstraw	23,676
Orangetown	52,080
Clarkstown	57,883
Ramapo	73,051
Total	218,804

The population of the County in 1960 was 136,803. The population increase from 1960 to 1969 was 59.9% as determined by the Bureau of the Census. The Rockland County Planning Board has projected that the population in 1985 will be 370,000.

Pursuant to an order of the Supreme Court of the State of New York, the County of Rockland adopted a plan of reapportionment (A. 1) which was approved with some modifications by a judgment of that Court. (See opinions at A. 10 and A. 19.) The plan of reapportionment provided for an 18 member Legislature with all

the powers and duties of a Board of Supervisors. It further provided that the county legislators be elected from five districts within the County. The number of legislators to be allocated to each of the districts was determined by dividing the population of each district by the population of the smallest district. One legislator was allocated to the smallest district and the other legislators were allocated to the remaining districts in accordance with the population of each district. Thus, there were established one single-member district and four multi-member districts. In order to preserve the integrity of the towns and to avoid fragmentation, district and town boundary lines were coterminous. A town supervisor elected within a town as the executive of a town government was permitted to be elected to the County Legislature as a county legislator.

The ideal representation of 12,156 persons per legislator is computed by dividing the total population by the number of legislators. (See Appendix A-2 of this brief.) This figure of ideal representation compared with actual representation shows the extent of over or underrepresentation as follows:

District	Population	Number of Legislators	Population per legislator	% of representation in relation to ideal representation
Stony Point	12,114	1	12,114	0.3% overrepresented
Haverstraw	23,676	2	11,838	2.5% overrepresented
Orangetown	52,080	4	13,020	7.1% underrepresented
Clarkstown	57,883	5	11,577	4.8% overrepresented
Ramapo	73,051	6	12,175	0.2% underrepresented

From this tabulation it appears that Orangetown is underrepresented by 7.1% and Clarkstown is overrepresented by 4.8%, a maximum spread of 11.9%.

This plan of reapportionment was devised in good faith by the Board of Supervisors of Rockland County in compliance with the "one-man, one-vote" rule. This plan also had the desired effect of maintaining the integrity of the towns which had been represented by the town supervisors sitting on the County Board of Supervisors for over a century.

The plan of reapportionment was implemented by a judgment of the Supreme Court (A. 6) and affirmed by the Appellate Division of the Supreme Court (A. 24) and the Court of Appeals (A. 34). County Legislators were elected at the general election in 1969 and took office on January 1, 1970.

Summary of Argument

This case involves the application of the equal-population principle of *Reynolds* v. *Sims*, 377 U. S. 533 and *Avery* v. *Midland County*, 390 U. S. 474, to the plan of reapportionment adopted for the governing body of a local county government in the State of New York. The question is whether a population deviation of 7.1% above and 4.8% below the ideal population per legislator is justified.

Respondents contend that such a deviation is justified by the need to adhere to political subdivision boundaries. The use of town boundaries within Rockland County to establish district lines will maintain a desirable interrelationship between town and county government. The cases of *Kirkpatrick* v. *Preisler*, 394 U. S. 526 and *Wells* v. *Rockefeller*, 394 U. S. 542, are distinguishable because

these cases involved population variances on the Congressional level. The Court in the *Kirkpatrick* and *Wells* cases did not make the principle of equal-population an inflexible test of mathematical exactitude, which would preclude any acceptable justification for population deviations on the local level. It is further shown that the multimember district plan in Rockland County is inherently valid and not susceptible to attack by a mathematical analysis of the representation process. Finally, respondents contend that there are sound public policy considerations which must be weighed in the balance in connection with the application of the equal-population principle to local governments. Local governments, to be effective and responsive to the public, particularly in fast growing suburban and urban areas, must be permitted the flexibility to develop new approaches to present day problems. A tight mathematical formula will inhibit such flexibility.

ARGUMENT

I. Adherence to political subdivision boundaries at the local level is a rational justification for minor population deviations among legislative districts.

The court below held that the population deviations from exact equality in the Rockland County apportionment plan were within permissible limitations. In *Reynolds* v. *Sims,* 377 U. S. 533, 577, this court stated:

> "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

As was said in *Reynolds* v. *Sims,* 377 U. S. 533, 577, the "Equal Protection Clause requires that a state make

a good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." The equal-population principle enunciated in *Reynolds* v. *Sims* was clearly made applicable to the representation function in local government units in *Avery* v. *Midland County,* 390 U. S. 474. However, the *Avery* case did not specify what population deviations at the local level are consistent with the standard of substantial population equality.

It is self-evident that the Equal Protection Clause cannot be held to apply in any less degree to one level of government than to another. A voter's rights must be protected at all levels of representation. It is consistent, however, with the uniform application of the Equal Protection Clause, to permit population deviations justified by a rational state policy (*Swann* v. *Adams,* 385 U. S. 440). In that case the deviations were 30% among Senate districts and 40% among House districts and the court said, at page 444, "De minimis deviations are unavoidable, . . . and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy."

Similarly in *Kilgarlin* v. *Hill,* 386 U. S. 120, the court relying on *Swann* v. *Adams* held that a variance ratio of 1.31 to 1 in the Texas House of Representatives and a population deviation from the norm of 14.84% overrepresented and 11.64% underrepresented were not minor deviations that would permit retention of established political subdivisions. It was stated (386 U. S. 120, 122) "that unless satisfactorily justified by the court or by the evidence of the record, population variances of the size and significance evident here are sufficient to invalidate an apportionment plan." The rule of equal population has thus been applied to allow minor deviations when justifiable.

This raises the question of whether deviations of 7.1% underrepresented and 4.8% overrepresented in Rockland County are justified within a rational state policy. (For a mathematical analysis of the districts in Rockland County see Appendix A-2 of this brief.) The court below reasoned that the population variation from high to low of 11.9% and the ratio of 1.13 to 1 were justified because there was an adherence to existing political boundary lines of the towns within the county. Since equality is the foundation of the rule of equal-population, it is not enough, in an attempt to justify a variance, to state that there has been adherence to political boundary lines in drawing the districts. We must go beyond this and demonstrate that at the local level the unique interrelationship between town and county governments provides a compelling and rational reason for adhering to town boundaries in the drawing of districts in the State of New York.

Historically in New York, functions of local government have been performed by counties, cities, towns and villages. For several centuries in New York, county government has been governed by a Board of Supervisors which performs legislative and administrative functions. The supervisors are not separately elected as county officers but hold their positions by virtue of their election as supervisors of the towns within the county.[1] Thus the elected executive in each town serves as a member of the County Board of Supervisors. In New York overlapping governmental services are provided by both the town and county governments. Towns have planning and zoning powers, provide for law enforcement,

[1] Section 150 of the County Law of New York (11 McKinney's Consol. Laws) provides, "The supervisors of the several cities and towns in each county, when lawfully convened, shall constitute the board of supervisors of the county."

regulate businesses, maintain roads and highways, provide for sewage and refuse collection and other similar services, and exercise the general police power.[2] The counties in New York, among other things, have historically been responsible for the county jail, the county court system, maintaining county roads, providing protection through the county sheriff, and levying of taxes.[3] In addition, counties are now responsible for providing services in the areas of welfare, health, mental health, sewage collection and treatment, water and air pollution, drainage and refuse collections, and almost every other area of governmental functions. As can be readily seen, there is an overlapping of functions between the town and county governments. In the fiscal area towns adopt their own budgets and submit the amount of money to be raised by taxes to the county government. The county government then levies the tax for both the town and county purposes. The towns then collect the taxes for both the town and the county and remit the county's share of the tax to the County Treasurer. The taxes for both the town and the county are levied based upon the real property assessments that are established by each town separately and then equalized between the towns by the County Board of Supervisors. In addition to this intricate relationship between town and county government in the fiscal area, the services rendered by the two levels of government are also tightly interwoven. The County of Rockland has formulated a large sewer district which has constructed a sewage treatment plant and trunk sewer lines which serve parts of the three largest towns in the county. The towns, on the other hand,

---

[2] See, generally, Town Law of New York (61 McKinney's Consol. Laws).

[3] See, generally, County Law of New York (11 McKinney's Consol. Laws).

have constructed lateral sewer lines in the streets which tie into the trunk lines so that there is one integrated system which operates as a result of town and county cooperation. The road system within the county is a crisscross of town and county roads which are separately maintained by each municipality; however, snow removal is provided for through cooperative arrangements between the municipalities.

Turning now to the specific situation in this case, respondents maintain that the need for continuing cooperation between county and town governments in Rockland County has become acute due to the increased demand for services from the public. This demand arises from the population explosion which has occurred as a result of the close proximity of the County to the City of New York. Rockland County is a suburban county which has evidenced a population increase of 59.9% from 1960 to 1969.[4] Since the functions of both town and county government are closely interrelated, it is impossible to meet the demands for services without cooperation between them. The pre-existing Board of Supervisors of the County had such cooperation because the elected executive in the towns served on the County Board of Supervisors. The town governments thus had a direct voice in the performance of county government. The implementation of the equal-population principle on the county level can have the side effect of pulling town and county governments apart and thus polarizing these two levels of government. Under any apportionment scheme, other than a weighted voting plan, the town executive no longer serves on the county legislative body, resulting in a separation of these two levels of government. In order to minimize the impact of this side effect on the operation

[4] Bureau of the Census, Special Census of Rockland County, May 2, 1969.

of government in Rockland County, the plan of reapportionment which was adopted sought to maintain, to the extent possible, the voice of town government in the county legislative body. This was done by permitting the town supervisor to be elected also to the County Legislature from the identical constituency that elected him to the town government. Thus the town government would continue to be directly represented on the county level. This can only be accomplished by establishing districts that adhere to town lines so that the constituency of the county legislator would be the same as the constituency of the town supervisor. In order to maintain the integrity of the towns the Board of Supervisors adopted an apportionment scheme which provided for multimember districts whereby legislators were elected to each district in proportion to the population of the district. In short, the establishment of this plan avoided the necessity of fragmenting the towns which would be required if a single-member district plan were created. The crisis demands that have been imposed on the various levels of government in this suburban county require innovation and farsighted planning to create a structure of government that will be responsive to the needs of the people. These are the practical considerations compelling the County Legislature to develop and support a rational plan of reapportionment with districts that will permit the town governments to have a voice in the operation of county government. To accomplish this, districts were established that maintain the political boundaries of the towns. Any inquiry as to the rational justification for minor population variations at the local level must be made against the backdrop of the Rockland County town-county governmental framework. A sterile mathematical approach to the problems of districting in local government ignores reality.

In New York the State Legislature adopted a policy of maintaining the integrity of political subdivisions by enacting Chapter 834 of the Laws of 1969 (more fully set forth in Appendix A-1 of this brief) amending Section 10 of the Municipal Home Rule Law of New York which provides in part as follows:

> "(a.) A plan of apportionment adopted under this subparagraph shall comply with the following standards, which shall have priority in the order herein set forth, to the extent applicable:
>
> (i.) The plan shall provide substantially equal weight for all the voters of that local government in the allocation of representation in the local legislative body.
>
> (ii.) In such plan adopted by a county, no town except a town having more than one hundred and ten per cent of a full ratio for each representative, shall be divided in the formation of representation areas. Adjacent representation areas in the same town or city shall not contain a greater excess in population than five per cent of a full ratio for each representative.
>
> (iii.) The plan shall provide substantially fair and effective representation for the people of the local government as organized in political parties.
>
> (iv.) Representation areas shall be of convenient and contiguous territory in as compact form as practicable."

This statute reflects the policy of the State of New York to retain the integrity of town political boundaries to the extent possible. The implementation of this policy follows the principle set forth in *Swann* v. *Adams,* 385 U. S. 440,

444, where the court stated that population differences will not be approved without a satisfactory explanation grounded on acceptable state policy. Thus we see that the minor population variances in the apportionment scheme for Rockland County result from districting that is based upon a rational state policy.

The County of Rockland made numerous efforts to establish a plan of reapportionment which would be acceptable to the people. As a result of a directive from the Federal Court in another taxpayer's action (*Lodico* v. *Board of Supervisors of Rockland County*, 256 F. Supp. 442), the Board of Supervisors placed propositions on the ballot for approval of plans of reapportionment at the general election in November of 1966 and at a special election in the spring of 1967. A multimember and a single-member district plan were both rejected by the voters. It is clearly established by the record that the Board of Supervisors of Rockland County acted in good faith and made every reasonable effort to formulate a plan of reapportionment that would be acceptable to the citizens of Rockland County. As a result of the rejection of its reapportionment plans by the voters, the Board of Supervisors sought approval and implementation of a plan by the courts. The good faith of the Board of Supervisors in creating a plan of reapportionment for Rockland County is evidenced by the fact that no other plan can be devised with a smaller population variance unless the boundaries of the towns are to be ignored. A plan adhering to town lines cannot be devised with any less of a population deviation. In *Kilgarlin* v. *Hill*, 386 U. S. 120, the court rejected a state redistricting plan which involved a ratio of the largest to the smallest of 1.31 to 1 taking note of the fact that there were two other plans, proposed upon the very thesis the state asserted, which produced substantially smaller deviations. In the case at bar there is no way that

the population deviations can be minimized unless the policy of following town boundaries is abandoned. The petitioners, June Molof, et al., state in their brief (p. 10) that they presented a single-member district plan which produced a 3.5% deviation. This plan was contained in a map which was not available to the Board of Supervisors or the lower court when the apportionment scheme was prepared and approved, and was seen for the first time when it was presented to the Court of Appeals on oral argument in this case. The good faith of the Board of Supervisors in adopting a multimember district plan cannot be impugned merely by showing that a different type of plan, such as a single-member district plan which does not adhere to political boundaries, can be produced.

Any argument that future population changes within the county may result in a more substantial deviation under the apportionment scheme in Rockland County misses the mark with regard to the scope of inquiry relating to constitutional requirements. All reapportionment plans are vulnerable to population shifts. This applies to single-member as well as multimember districts. We cannot speculate about future population changes but must look only at the existing plan with reference to the latest available census figures. The petitioners have argued that the plan of reapportionment is unconstitutional for the reason that there may be a disproportionate population growth in each of the districts and any new allocation of legislators resulting from this change may create a larger deviation than evidenced by the 1969 census. Reliance has been placed upon the observation of Chief Judge Fuld in the dissenting opinion below on this point (A. 46, A. 47). It is self-evident that under any plan of reapportionment population variances will change with population shifts. The future variances may be larger or they may be smaller. In any case the court cannot speculate about population

changes but must determine the constitutionality of the plan based upon the existing census figures. If district lines must be changed in the future or if alterations in the apportionment scheme are necessary to accommodate population shifts, the legislative body will do what must be done to meet constitutional requirements.

The apportionment scheme in Rockland County does not have any built-in bias favoring one district over another as was present in *Hadley* v. *Junior College District of Metropolitan Kansas City*, — U. S. —, 24 L Ed 2d 45, 52. In fact, the very essence of the problem of future population shifts serves to enforce the proposition that insistence on mathematical exactitude at any one point in time is an ethereal standard.

The record here is free of any allegations of discrimination, whether of a racial or political nature, in the drawing of district lines. The rules established in *Burns* v. *Richardson*, 384 U. S. 73, for the creation of multimember districts have been complied with. The drawing of district lines which adhere to town boundaries has eliminated any possibility of invidious discrimination which would minimize or cancel out the voting strength of racial or political elements of the voting population. The use of pre-established town boundary lines also has the positive effect of preventing the evils of gerrymandering. If existing political boundaries are ignored, the door is then opened to racial and political gerrymandering. Although the use of existing political boundary lines does not foreclose partisan selection of district lines, it does severely limit the possibility of carving out districts which break up racial, ethnic or socio-economic groups which may have a common interest and seek a voice in government. In *Reynolds* v. *Sims*, 377 U. S. 533, 578-579, it was stated that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more

than an open invitation to partisan gerrymandering." The establishment of districts is inevitably a political process and the ultimate goal should be to provide fair and effective representation to the diverse groups within the community. The application of an abstract mathematical test of equality which compels the drawing of district lines without reference to existing political boundaries invites gerrymandering which can destroy the ability of groups with a common interest to achieve effective representation.[5] The application of a rigid mathematical test can be a godsend to the gerrymanderer. New lines can be drawn to meet any political exigencies. This evil is of paramount concern since not only is it difficult to prove political gerrymandering, it is doubtful that the courts will consider this a justiciable issue over which they will exercise any restraint.

It has been demonstrated that the County of Rockland has established district lines with a minimal population variance justified by the adherence to town lines. If it is argued that such a justification has not been shown here, then one must reach the conclusion that on the local level multimember districts following town lines are unacceptable under any circumstances. The only purpose in creating multimember districts in Rockland County is to permit the retention of the interrelationship between levels of local government within the existing framework. If this is not a legitimate and rational justification for adhering to political boundaries, then it would be indeed difficult to conjure up any circumstances that would permit a population variance. A sterile mathematical approach which precludes any realistic justification for population deviations at the local level ignores the practical complexities that are present in the structural interrelationships of local government. We have shown why the adherence to town boundaries is a rational justification for minor population devia-

[5] See, generally, Dixon, *Democratic Representation: Reapportionment in Law and Politics*, 458 (1968), The Oxford Univ. Press.

tions at the local level. It now remains to demonstrate that circumstances leading to justifications for population deviations may vary at the local level from those on the state and congressional level.

II. This Court's decisions in the *Kirkpatrick* and *Wells* cases do not prohibit justifiable population deviations on the local level.

The decisions of *Kirkpatrick* v. *Preisler,* 394 U. S. 526 and *Wells* v. *Rockefeller,* 394 U. S. 542 involving congressional districts in the States of Missouri and New York are not inconsistent with the decision of the Court of Appeals in this case. In the *Kirkpatrick* case the court rejected a population deviation that ranged from 3.13% above the mathematical ideal to 2.84% below the ideal, or a spread of 5.97%. In the *Wells* case this court disapproved a population deviation that ranged from 6.488% above the state mean to 6.608% below the mean, or a spread of 13.096%. The population deviations in the case now before the court range from 7.1% above the ideal population per legislator to 4.8% below the ideal population per legislator, or a spread of 11.9% as shown in Appendix A-2 of this brief.

In *Reynolds* v. *Sims,* 377 U. S. 533, 577-578, the court recognized that some deviations may be made at different levels of government and stated:

> "In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legisla-

tive bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

In *Avery* v. *Midland County*, 390 U. S. 474, 484-485, the court, citing the *Reynolds* case in applying the equal-population principle to local governments, said that the "Constitution permits no substantial variation from equal population in drawing districts for units of local government . . ."

The question remains whether the percentage population deviations that were rejected in the *Kirkpatrick* and *Wells* cases establish a tight mathematical test which must be applied on a local level to meet the rule in the *Avery* case requiring no substantial variation. In the *Kirkpatrick* case the court rejected the argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and stated at page 530:

"The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each par-

ticular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district."

It is thus apparent that percentage deviations may vary from one situation to another and the court must look at the facts and circumstances in each case to determine whether they are justified. A careful examination of the facts in the *Kirkpatrick* case makes it clear why the population spread from high to low of 5.97% was not acceptable. The court stated that less accurate data than the census figures had been relied on; that the legislature had rejected a redistricting plan which provided for smaller population variations, and that by the simple device of shifting some counties from one district to another the variances could have been reduced. In short, the court found that the population variances were not unavoidable and that the legislature did not seriously contend that it came as close to equality as it might have come. The state failed to show any acceptable justification for the population variances. The *Kirkpatrick* decision in rejecting a mathematical spread of 5.97% cannot be blindly applied in an attempt to reverse the opinion of the Court below in this case. A comparison, in a vacuum of percentage deviations from one case to another without reference to the facts that may provide an acceptable justification, can only lead to a sterile, absolutist approach which ignores reality.

In the *Wells* case the heart of the congressional districting scheme lay in the decision to treat sections of the State of New York as homogeneous regions and to divide these regions into districts of virtually identical population. It was held that the plan was invalid since the requirement is to equalize population in all districts and not merely between defined regions of the state. The

court discussed the invalidity of the plan in the following terms (394 U. S. 542, 546):

> "New York could not and does not claim that the legislature made a good-faith effort to achieve precise mathematical equality among its 41 congressional districts. Rather, New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact."

Thus the districting plan in New York could not be approved for the reason that the attempted justification for population variances was founded on the false premise that regions of the state can be isolated and equal districts created within the regions. Here again we see that the application of the principle of equal-population requires a careful analysis of the reasons for the scheme of reapportionment and not merely the cold application of a mathematical test. If the court is to impose a standard of near perfection in connection with districting, then it must realistically evaluate the necessity in some cases for legitimate population variances.

There is no question that the Board of Supervisors of Rockland County acted in good faith in devising a plan of reapportionment, and it has been demonstrated that the adherence to town lines is founded on a rational policy of the state. If the court rejects the justification for minor population variances in this case, it will in fact be saying that there is no possible justification for any deviation. If a tight mathematical test is applied, what excuse will there ever be for a percentage deviation of one percent or even one-tenth of one percent? The application of a test of minimal percentage deviations on the local level without any other considerations can produce absurd results. In Rockland County a one percent deviation from the

ideal population per legislator amounts to 121 people. One apartment house in Rockland County may contain several hundred people. Are we to start drawing lines through and around buildings? The maximum deviation is in the Town of Orangetown which is 7.1% underrepresented (see Appendix to this brief, A-2). It is patently unworkable to expect that a map should be drawn without regard to the town boundary, to carve out several apartment houses or several blocks of single family residences for the purpose of excluding 859 people from the district to account for a 7.1% variance. A one percent population deviation in the New York Congressional districts amounts to 4,093 people. It is one thing to draw district lines to pick up 4,093 people and another to shift lines to include only 121 people. These are some of the very practical difficulties that must be observed in comparing the problems of redistricting at the congressional, state and local levels. It is very apparent that a small numerical deviation from a population base will produce a larger percentage of disparity at the local level than at the state or congressional level. The *Kirkpatrick* and *Wells* cases must be viewed within the context of the test laid down in the *Reynolds* case which requires districts "as nearly of equal population as is practicable" (377 U. S. 533, 577). These two more recent cases involving the congressional districts did not undercut the *Reynolds* decision so as to reduce the test of "equality as nearly as practicable" to one where the court will only examine the percentage population deviations without considering other factors.

An absolutist approach to population variances may appear on the surface to be a rule of easy application and one which is judicially manageable. However, on close scrutiny such an approach ignores the complexities that exist on the local level. Any standard that is absolute in its terms will produce an illusory goal of equality

resulting in the search for a plan so equal that no other plan can be devised that is more equal. To apply a strict mathematical test without accepting any valid justification for population variances will stimulate perpetual litigation at the local level and unnecessarily propel the courts into the nightmarish task of drawing district lines.

In the State of New York there are only a few, if any, districting plans that have less of a population variance than is evident in Rockland County.[6] The problems of applying an inflexible test of mathematical exactitude on the local level are overwhelming, and it cannot be concluded from the foregoing analysis of the facts in the *Kirkpatrick* and *Wells* cases that the court intends to impose such a standard at the local level which is intolerant of reality. The Court of Appeals in the decision below wisely applied the principle of equal-population at the local level within the framework of the varying levels of government by stating (A. 37):

> "On this point, it should be recognized that the 'one-man, one-vote' cases have involved at least three levels of legislative reapportionment and that, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance different considerations both as to the permissible variations from strict equality and as to the justification for variations from such strict equality."

---

[6] See, generally, in this regard, Information Bulletins #17 and #18, *Reapportionment, Local Government Legislative Bodies*, by Office of Local Government, Albany, N. Y. These bulletins contain information relating to the status of reapportionment in New York State and indicate that as of January 1, 1970, 26 counties will be operating under district plans, 15 under permanent weighted voting plans and 3 under interim weighted voting plans. Of the district plans, eight counties have plans with multimember districts.

This court should permit some population variances so long as they are the result of legitimate circumstances incident to a rational policy based primarily upon population.

III. The Rockland County apportionment plan is inherently valid under the Equal Protection Clause and is not susceptible to attack by a mathematical analysis of the representation process.

In Rockland County the plan of apportionment includes one single-member district and four multimember districts. The use of multimember districts for legislative representation has been approved by this court in *Fortson* v. *Dorsey*, 379 U. S. 433, and *Burns* v. *Richardson*, 384 U. S. 73. Multimember districts were also before this court in *Swann* v. *Adams*, 385 U. S. 440, and *Kilgarlin* v. *Hill*, 386 U. S. 120, although in these two cases the plans of apportionment were rejected as a result of the population variances. In the *Kilgarlin* case (at page 125, n. 3) reference was made to the use of a mathematical analysis of multimember districts by, Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 Yale L. J. 1309 (1966). This analysis purports to establish that the voters in multimember districts as contrasted with those in single-member districts, have a greater influence on the outcome of the votes within the legislative body.

Although this point has not been raised by the petitioners in their briefs, this court is undoubtedly aware of the writings of commentators who have applied higher mathematics in analyzing apportionment plans.[7] Multimember

[7] Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 Yale L. J. 1309 (1966); Dixon, *Democratic Representation: Reapportionment in Law and Politics*, 537 (1968), The Oxford Univ. Press; Pennock & Chapman, Editors, *Representation: Nomos X*, 183 (1968), Atherton Press.

districts are established by electing representatives to districts in proportion to the population of each district. If district A has a population of 30,000 and district B has a population of 10,000, it is self-evident that one representative being elected from each district would result in district A being underrepresented. To eliminate this inequality two additional representatives are assigned to district A so that district A has three representatives and district B has one. Another possible method of providing for equality is to divide district A into three separate districts and elect one representative from each new district. In either case the result is the same. A third alternative is to weight the vote of the representative in district A so that he has three votes instead of one. This will not produce equality since the representative from district B, with only one vote, could never cast a critical or deciding vote.

Thus the voting power of the representative in district B under the weighted voting system is zero. This would, in effect, give the voters in district B no effective influence in the legislative body and thus invalidate a plan of weighted voting under these circumstances.

The question at issue here is whether a multimember district plan is acceptable. If the three representatives from multimember district A always voted as a bloc it is clear that they would outvote the one representative from district B. However, bloc voting cannot be assumed in creating any mathematical model. Although legislators may all come from the same district, they will in varying degrees be influenced by party alliances, ethnic blocs, regional differences and interests, and many other factors that are part of the political process. Thus it must be concluded that bloc voting is not a realistic assumption in multimember districts. The voting power of each

representative in the legislative body is the same, unlike the weighted voting example described above. Each representative in the multimember district plan has the same power to cast a deciding or critical vote in the legislative body. It is thus apparent that the deficiencies which are present in a weighted voting system, as described, are not found in a multimember district plan with regard to the voting power of the representatives in the legislative body.

The next step of the analysis requires an examination of the influence or effectiveness of the citizen in a multimember district plan. It has been argued [8] that mathematically the citizens in the multimember districts have an advantage and that the ability of an individual to influence his representative varies as the inverse of the square root of the district population, rather than as the simple inverse of the population of the district. This argument, which has been developed from a mathematical model of the representation process, seeks to prove that the influence of the citizen voter is proportional to the square root of the population of the district. The argument must fail for the reason that the political process of representation in our democracy has too many variables to permit the construction of an abstract mathematical model to test whether or not there is equal voter influence in the constituencies from which legislators are elected.

Furthermore, the propounded arguments relating to multimember districts are founded upon the assumption that the representative is an agent of the constituency and he votes in compliance with the desires of his constituency. This is a gross oversimplification of the func-

[8] Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 Yale L. J. 1309 (1966); Banzhaf, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation*, 36 Geo. Wash. Law Rev., 808 (1968).

tion of legislators in our society. It is true that a legislator will consider the wishes of his constituents, but as a practical matter he will vote on issues as they affect the entire area, which is being governed for the good of all. We cannot say, a priori, that a representative does not consider the good of the entire community as opposed to only the wishes of his constituency. Thus the use of mathematical models which are based upon theoretical assumptions about the workings of the political system cannot be accepted by the court in considering the use of multimember districts in Rockland County. Various political factors, including the effect of political parties, make it very difficult, if not impossible, to construct any true mathematical models of the functioning of the representative process in government. The analysis of apportionment plans by the court should not be placed on a sophisticated mathematical level since such an approach will cloud the real goal of apportionment, which is to provide for "fair and effective representation for all citizens" (*Reynolds* v. *Sims*, 377 U. S. 533, 565).

The use of multimember districts in Rockland County will in no way submerge or minimize the interests of any minority groups in the County as was the case in *Chavis* v. *Whitcomb*, 305 F. Supp. 1364 (Pending on Appeal, No. 735, 1198 this term), where the apportionment plan for the Legislature of the State of Indiana was invalidated. The principle established in the *Fortson* and *Burns* cases is that, inherently, multimember district plans are not in violation of the Equal Protection Clause. This same principle applies to the plan of apportionment for Rockland County. Thus the multimember district plan for Rockland County is not susceptible to attack by a mathematical analysis of the representation process.

IV. Sound policy considerations require some flexibility in the application of the equal-population principle to local governments.

The reapportionment revolution has had the desired effect of revitalizing those state governments which were stagnating under the control of rurally dominated legislatures which were unresponsive to the needs of the underrepresented urban and suburban communities. The application of the principle of equal-population, which has brought about the desired result, should not be used in a simplistic manner on the local level so as to stifle needed experimentation in reforming the structure of local governments.

It is apparent throughout this country that the structure of urban and suburban governments is obsolete and incapable of meeting the demands for needed services. Core cities serve the middle class population during the working day but are denied an adequate tax base to meet the demands for public services. Suburban areas are faced with a population explosion of crisis proportions, causing an unmanageable demand for services, which cannot be paid for by taxing real property. One solution is to broaden the tax base to encompass both urban and suburban areas, which will allow for a pooling of resources to combat regional problems such as transportation, sewage and refuse disposal, air pollution, law enforcement and other social needs. In order to resolve some of these regional problems, new and imaginative approaches to the structure of government will be required in the decades ahead. The constitutional requirement of equal-population should not become such a rigid standard that flexible approaches in reaching a detente between urban and suburban areas will become impossible.[9]

---

[9] See, generally, in this regard, *Symposium—One Man-One Vote And Local Government,* 36 Geo. Wash. Law Rev. 741 et seq. (1968).

This court has reflected upon these problems and allowed for such flexibility on the local level in *Dusch* v. *Davis,* 387 U. S. 112. In the *Avery* case (390 U. S. 474) and again in the most recent case of *Hadley* v. *The Junior College District of Metropolitan Kansas City,* —— U. S. ——, 25 L Ed 2d 45, the court referred to the *Dusch* case as illustrative of permissible ways to insure the achievement of legitimate political goals of representation. The *Dusch* case involves the application of the rule of one-man, one-vote to a local government formed as a result of the consolidation of the City of Virginia Beach in Virginia with an adjoining county. Elections at large were upheld even though seven members of an elected eleven man council were required to be residents of districts with varying populations. It appears that the rationale of this decision was to permit reasonable flexibility, which would not foreclose experimentation in forms of representation at the local level. This case is indicative of the court's awareness of the complexities which inevitably will arise between urban and suburban governments within the framework of the political process. In *Sailors* v. *Kent Board of Education,* 387 U. S. 105, at 110-111 it was stated:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

Just as flexibility is required in the application of the equal-population principle to regional forms of government so it must allow representation within the context of the long established town-county government framework. The need for a countywide approach to transportation, sewage disposal, law enforcement and other services

necessitates a viable scheme of interrelationship between the town and county levels of government in Rockland County. If the voice of the towns is submerged and cut off from participation in the operation of county government there will be a regressive movement away from a countywide regional approach to the providing of public services.

The use of multimember districts in Rockland County which conform to existing town government constituencies will permit the towns to play a vital role in the operation of county government. The role of town governments on the county level has been continued in Rockland County since the town supervisor—the elected executive of the town—is permitted to serve simultaneously as the town representative on the county legislative body. Reapportionment on the congressional and state level involves the process of shifting and adjusting district lines to comply with the equal-population principle. However, the application of this principle on the local level to counties in New York has the corollary effect of destroying the traditional structural relationship between town and county governments. Thus, the impact of this constitutional requirement in Rockland County not only affects representation but also alters the entire structure of county government. A decision as to the acceptability of the plan of reapportionment now before this court must be viewed in this context of the structural relationship between the two levels of government.

If local governments cannot restructure, they will stagnate under the crisis demands of the decades ahead and, of necessity, abdicate their responsibilities to the state and federal government. The equal-population principle should not be converted into a standard of absolute mathematical exactitude which will foreclose any flexibility in

the structuring of local governments. Although the application of such a rigid test has an appealing simplicity, it should be recognized that the constitutional goal of fair and effective representation will be achieved if the ultimate constituent power has an opportunity to express itself.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

J. Martin Cornell,
Attorney for Respondents.

Arthur J. Prindle,
County Attorney of Rockland County.

May 7, 1970

APPENDIX A-1

Chapter 834 of the Laws of 1969 of the State of New York, amending Section 10 of the Municipal Home Rule Law, provides in part as follows:

> Section 1. Statement of legislative intent. The requirement that constituencies of legislators must be substantially equal in population, so as to prevent an impairment of the constitutionally protected right to vote, as lately found and declared by the federal judiciary, imposed upon many local governments the obligation to make confirming adjustments in the structures of their legislative bodies. The judiciary of this state, on the basis of the provisions of the state constitution made a similar finding. The experience of the intervening years has demonstrated that existing law in many cases, does not adequately permit local governments to recast the structures of the legislative bodies in a form which complies with the aforesaid requirements. In particular local governments have been deprived of the freedom to choose various optional forms of legislative structure, have been required to expend large sums of money and encounter considerable delay in obtaining current statistical information, and have been enmeshed in lengthy and unproductive litigation by reason of the referenda requirements imposed by existing law or judicial decree.
>
> It is the purpose of this act to insure (1) that the electorate of local governments shall have the maximum freedom in selecting for themselves a legislative structure which complies with the requirements of law and at the same time meets the needs of each locality; (2) that the exercise of that freedom of

choice shall not be encumbered by requirements that local governments use obsolete information or await costly new statistics; and (3) that meaningful and effective restructuring of local legislative bodies can be accomplished by utilizing referenda which preserve the right of the people to separate submission of the principle elements involved therein. It is recognized that local governments do have some powers of local legislation respecting restructuring of their legislative bodies and this act is intended to extend alternative powers to them. To the extent that local governments already have local legislative powers not subject to referenda requirements, or subject to less restrictive referenda requirements, this act is not intended to and does not impose additional referenda requirements upon them in the exercise of such powers.

1. In addition to powers granted in the constitution the statute of local governments or in any other law, (i) every local government shall have the power to adopt and amend local laws . . . relating to the following subjects . . .

(13) The apportionment of its legislative body and, only in connection with such action taken pursuant to this subparagraph, the composition and membership of such body, the terms of office of members thereof, the units of local government or other areas from which representatives are to be chosen and the voting powers of individual members of such legislative body. The power granted by this subparagraph shall be in addition to and not in substitution for any other power and the provisions of this subparagraph shall apply only to local governments which adopt a plan of apportionment thereunder.

(a.) A plan of apportionment adopted under this subparagraph shall comply with the following standards, which shall have priority in the order herein set forth, to the extent applicable:

(i.) The plan shall provide substantially equal weight for all the voters of that local government in the allocation of representation in the local legislative body.

(ii.) In such plan adopted by a county, no town except a town having more than one hundred and ten per cent of a full ratio for each representative, shall be divided in the formation of representation areas. Adjacent representation areas in the same town or city shall not contain a greater excess in population than five per cent of a full ratio for each representative.

(iii.) The plan shall provide substantially fair and effective representation for the people of the local government as organized in political parties.

(iv.) Representation areas shall be of convenient and contiguous territory in as compact form as practicable.

(b.) A plan of apportionment adopted by a county under this subparagraph may provide that mayors of cities or villages, supervisors of towns or members of the legislative bodies of cities, towns, or villages, who reside in the county shall be eligible to be elected as members of the county legislative body.

(c.) As used in this subparagraph the term "population" shall mean residents, citizens, or registered voters. A population base for such a plan of appor-

tionment shall utilize the latest statistical information obtainable from an official enumeration done at the same time for all the residents, citizens, or registered voters of the local government. Such a plan may allocate, by extrapolation or any other rational method, such latest statistical information to representation areas or units of local government, provided that any plan containing such an allocation shall have annexed thereto as an appendix, a detailed explanation of the allocation.

(d.) Where a public hearing on a local law proposed to be adopted under this subparagraph is required, by subdivision five of section twenty of this chapter, to be held only before an elective chief executive officer, the legislative body shall not adopt such proposed local law until after a public hearing shall have been held thereon before it, on notice as provided in such subdivision five, in which event no public hearing thereon before such chief executive officer shall be required.

(e) A local law proposed to be adopted under this subparagraph shall be subject to referendum only in the manner provided by paragraph j of subdivision two of section twenty-four of this chapter, except that such local law shall be subject to a mandatory referendum in any county in which a provision of law requires a mandatory referendum if a local law proposes a change in the form or composition of the elective governing body of the county. The local law may be so structured as to permit separate submission of the principle elements (such as, multiple office holding as in clause (b) above, the use of multiple member or floterial districts in por-

tions of the local government, and so forth) of the plan and also may provide alternatives in the event one or more of these separate submissions is rejected by the electorate.

(f.) Notwithstanding any inconsistent provisions of any general or special law, or any local law, ordinance, resolution or city or county charter heretofore or hereafter adopted, no local government may restructure its local legislative body (pursuant to provision of this chapter or any other provision of law) more than once in each decade commencing with the year nineteen hundred seventy; provided, however, that this prohibition shall not prevent the periodic adjustment of the weight of the votes of representatives on the basis of current census, voter, or other valid information where an existing plan distributes the votes of representatives on such a basis.

APPENDIX A-2

District	Legislators	Population	Population per legislator
No. 1 Stony Point	1	12,114	12,114
No. 2 Haverstraw	2	23,676	11,838
No. 3 Ramapo	6	73,051	12,175
No. 4 Clarkstown	5	57,883	11,577
No. 5 Orangetown	4	52,080	13,020
	18	218,804	

AVERAGE POPULATION PER LEGISLATOR

(218,804 ÷ 18)=12,156

DEVIATION FROM AVERAGE POPULATION CALCULATED AS FOLLOWS:

District

No. 1 Stony Point
12,156 Population average
—12,114 Population per legislator
42 ÷ 12,156=0.3% overrepresented

No. 2 Haverstraw
12,156 Population average
—11,838 Population per legislator
318 ÷ 12,156=2.5% overrepresented

No. 3 Ramapo
12,175 Population per legislator
—12,156 Population average
19 ÷ 12,156=0.2% underrepresented

No. 4 Clarkstown
12,156 Population average
—11,577 Population per legislator
579 ÷ 12,156=4.8% overrepresented

No. 5 Orangetown
13,020 Population per legislator
—12,156 Population average
864 ÷ 12,156=7.1% underrepresented

PROPORTION OF LARGEST TO SMALLEST POPULATION PER LEGISLATOR

Largest 13,020
Smallest 11,577
Variance (largest divided by smallest) 1.13 to 1